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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE
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12 IVAN SAGDAI,
13 Plaintiff,
14 v.
15 TRAVELERS HOME AND MARINE
16 INSURANCE COMPANY,
17 Defendant.

CASE NO. 2:21-cv-00182-LK

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION FOR SUMMARY
JUDGMENT

16 This matter comes before the Court on Travelers Home and Marine Insurance Company's
17 motion for summary judgment. Dkt. No. 41. For the reasons set forth below, the Court grants the
18 motion in part and denies it in part.¹ Specifically, the Court grants the motion as to Sagdai's claim
19 for bad faith based on Travelers' litigation conduct and request for access to the PIP file.
20 Otherwise, the motion is denied.

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23 ¹ Because this matter can be decided based on the parties' filings, the Court denies Travelers' request for oral argument.
24 In Sagdai's Notice of Intent and Request to File Surreply, he requested oral argument regarding "the material
contained" in any of his "material and arguments" that the Court strikes as inadmissible. Dkt. No. 58 at 1. The Court
denies that request because Sagdai is not entitled to orally present evidence that has been excluded as improperly filed.

I. BACKGROUND

This insurance dispute arises out of an automobile collision in October 2013 in Renton, Washington. Dkt. No. 2-3 at 3. Ivan Sagdai was stopped in traffic when another driver rear-ended his vehicle and caused it to “smash[]” into the car in front of him. *Id.* Sagdai settled his claims with the at-fault driver for \$25,000, the limits of that driver’s insurance. Dkt. No. 2-2 at 2. Sagdai then sought to recover under his Underinsured Motorists (“UIM”) insurance policy with Travelers. Dkt. No. 1-2 at 12; Dkt. No. 18-2 (the “Policy”). In this lawsuit, Sagdai alleges that Travelers underpaid and mishandled the UIM claim. Travelers counters that it properly handled the claim and paid the amount owed. It also contends that Sagdai failed to cooperate in the investigation.

A. The Insurance Policy

Relevant here are two Policy provisions. First, Travelers:

will pay damages which an “insured” is legally entitled to recover from the owner or operator of an “underinsured motor vehicle” because of “bodily injury”:

1. Sustained by an “insured”; and
 2. Caused by an accident.

Dkt. No. 18-2 at 23. Second, a “person seeking coverage” must:

1. Cooperate with [Travelers] in the investigation, settlement or defense of any claim or suit.
...
3. Submit, as often as [Travelers] reasonably require[s]:
 - a. to physical exams by physicians [Travelers] select[s].
4. Authorize [Travelers] to obtain:
 - a. medical reports; and
 - b. other pertinent records.

Id. at 28.

1 **B. Sagdai's Insurance Claim**

2 On March 19, 2019, Sagdai sent a demand letter to Travelers alleging that the crash caused
 3 physical injuries including “neck injury, mid back to low back injuries on both sides, back
 4 abdominal wall on both sides, shoulder blade region, along with pain in both arms and pain in the
 5 left upper leg and right lower leg.” Dkt. No. 2-3 at 8. He also alleged a traumatic brain injury that
 6 left him “unable to function at the level he did before the crash.” *Id.* The letter alleged that after
 7 the accident, Sagdai became unable to multi-task at work, got lost driving on occasion, became
 8 short-tempered with his employees, and experienced a change in his personality. *Id.* at 5. He also
 9 claimed difficulty concentrating and increased anxiety. *Id.* at 8. He alleged that in November 2013,
 10 a neurologist, Dr. Gregory Gorman, diagnosed him with a traumatic brain injury and noted
 11 cognitive slowing, headache, retrieval-type memory deficit, and diminished sense of smell. *Id.* He
 12 also alleged that an “MRI with tensor diffusion imaging showed interruption of the deep white
 13 matter tracts in [his] brain.” *Id.*

14 The demand letter further alleged that while “[m]ost of the physical injuries had healed,”
 15 Sagdai’s brain injury had not and was permanent. *Id.* The letter stated that he had economic
 16 damages totaling \$26,931.14 for medical expenses and associated mileage expenses, and general
 17 damages in an unspecified amount. *Id.* at 8–9. The letter went on to state that his claim “should be
 18 valued [at] no less than \$500,000[,]” but that he was “willing to settle the UIM part of his claim
 19 for his policy limits of \$250,000.00.” *Id.* at 9.

20 After receiving the demand letter, Travelers opened a claim and commenced an
 21 investigation. Dkt. No. 44 at 1–2. Based on the information Sagdai provided, Travelers issued
 22 payment of \$12,922.84 for personal injury protection (“PIP”) benefits under the PIP policy. Dkt.
 23 No. 41 at 3. Sagdai does not challenge the payment or the handling of his PIP claim in this
 24 litigation.

1 Travelers also evaluated Sagdai's UIM claim, reviewing the available records, speaking
2 with Sagdai's counsel, and tasking a nurse to "determine the causal relationship of the claimed
3 injuries to the MVA [motor vehicle accident]." Dkt. No. 52-1 at 238–240. After Travelers received
4 additional medical records, it asked the nurse to conduct a supplemental records review "for causal
5 relationship of treatment to the injury" and "for relatedness of the concussion to ongoing
6 complaints of a TBI [traumatic brain injury]." *Id.* at 242. After completing her supplemental
7 review, the nurse noted that the accident "appears to support soft tissue injuries to the spinal
8 regions." *Id.* She also noted that Sagdai "may have . . . sustained a closed head injury" but his
9 baseline status before the accident was unknown. *Id.* She wrote that the record contained results
10 from an MRI with diffusion tensor imaging that reflected "white mat[t]er changes" of unknown
11 origin. *Id.* at 243. She noted that Sagdai had been "diagnosed with a closed head injury (contusion
12 type injury) . . . [but] there is no evidence of 'ongoing' symptoms or a concussion diagnosis (wider
13 ranging injury to the brain)." *Id.* According to Travelers' claims adjustor, "Travelers' evaluation
14 of Plaintiff's medical records and bills" led Travelers to conclude "that the amount owed on the
15 UIM claim was \$10,000," and it communicated this offer to Sagdai. Dkt. No. 44 at 2. Travelers'
16 offer, dated April 26, 2019, explained that:

17 Mr. Sagdai received mainly chiropractic and massage treatment for his soft tissue
18 injuries that had multiple gaps in treatment sometimes as much as 6 months. Mr.
19 Sagdai continued working as a general contractor after his accident and did not miss
any time. Mr. Sagdai was diagnosed with contusion type head injury and referred
to a neuro, Dr. Gorman. Dr. Gorman did not refer him for a neuro-psychological
testing or any other assessment or prescribe any medications.

20 Dkt. No. 44-1 at 2. Sagdai rejected the offer. Dkt. No. 44 at 2.

21 By letter dated August 9, 2019, Sagdai disputed that he experienced only a contusion type
22 head injury, noting that Dr. Gorman diagnosed him with a "shake type closed head injury" and the
23 MRI showed findings consistent with such an injury. Dkt. No. 44-2 at 2. Sagdai requested
24

1 information about Travelers' decision, including the identity and qualifications of the reviewer, an
 2 "itemized breakdown of all medical diagnoses and treatment that Travelers has determined is
 3 related to the collision," "all medical charges that Travelers determined were reasonable for the
 4 geographic area," and a copy of "the medical review" of the claim. *Id.* at 2. After receiving that
 5 letter, Travelers asked for permission to review the medical records in Sagdai's PIP file, including
 6 a report from an independent medical examination ("IME") he had undergone and for Sagdai to
 7 participate in another IME. Dkt. Nos. 44 at 2, 19-1 at 2 (August 22, 2019 letter). Travelers did not
 8 review the records from the PIP claim to evaluate the UIM claim because "it is Travelers[']
 9 practice" to have separate adjusters assigned to each claim and "[w]ithout the insured's permission,
 10 the information between the two claims files is typically not shared." Dkt. No. 44 at 2. Sagdai did
 11 not respond to the August 2019 request for an IME. *Id.*

12 Travelers made multiple additional requests for Sagdai to participate in an IME. See Dkt.
 13 No. 18-1 at 4 (September 20, 2019 letter); *id.* at 6 (October 18, 2019 letter); *id.* at 8 (November
 14 27, 2019 letter); *id.* at 10 (December 17, 2019 letter); *id.* at 16 (January 23, 2020 letter); *id.* at 18
 15 (February 5, 2020 letter); *id.* at 21 (March 6, 2020 letter); *id.* at 24 (April 2, 2020 letter). In the
 16 same letters, Travelers also requested permission to review the documents in the PIP file. See *id.*

17 Sagdai did not agree to participate in an IME or allow Travelers' UIM claims examiner to
 18 access the PIP file. Dkt. No. 44 at 2–4. By letter dated December 13, 2019, his counsel noted that
 19 Travelers had not answered his questions from his August 9, 2019 letter. Dkt. No. 44-3 at 2. He
 20 wrote that "[b]ecause of Traveler[s]' handling of this claim, my client has directed me to file suit
 21 on this dispute." *Id.* Despite Sagdai's earlier rejection of its \$10,000 offer, on January 24, 2020
 22 Travelers tendered a \$10,000 check to Sagdai, without prejudice to his right to seek additional
 23 benefits, and Sagdai cashed the check. Dkt. No. 44 at 3.

24 By letter dated February 21, 2020, Sagdai disputed Travelers' assertion that it needed the

1 PIP information and IME to continue evaluating the claim because “Travelers had already
 2 completed its investigation and made an offer in compromise.” Dkt. No. 44-5 at 2. Sagdai also
 3 stated that Travelers first had to demonstrate that an IME was a reasonable request rather than an
 4 after-the-fact “coverup” for its allegedly deficient investigation. *Id.* at 3. Sagdai further noted that
 5 Travelers had not responded to his earlier requests for the name, credentials, and report of the
 6 expert who evaluated his claim, and to review the information on which Travelers relied to make
 7 its offer of \$10,000. *Id.*

8 **C. Sagdai Files Suit**

9 On February 1, 2021, Sagdai filed suit in King County Superior Court, alleging claims for
 10 breach of contract, breach of the duty of good faith, and violation of Washington’s Consumer
 11 Protection Act (“CPA”). Dkt. No. 1-2 at 16–18. Travelers removed the matter to this Court on
 12 February 12, 2021. Dkt. No. 1.

13 In November 2021, after Sagdai refused to participate in an IME as Travelers requested
 14 under Federal Rule of Civil Procedure 35, Travelers filed a motion to compel Sagdai to (1) appear
 15 for a Rule 35 examination; (2) respond to written discovery regarding his physical and mental
 16 conditions, injuries and treatment, and damages; and (3) appear and be deposed regarding those
 17 topics. Dkt. No. 17 at 2–3. The Court granted the motion, finding that Sagdai had placed his
 18 physical condition in controversy by claiming that his brain injury is permanent and requires
 19 ongoing medical care. Dkt. No. 28 at 4, 6. Accordingly, it ordered Sagdai to participate in an IME,
 20 respond to Travelers’ written discovery requests, and be deposed. *Id.* at 6. Dr. James Blue
 21 subsequently conducted an IME. Dkt. No. 43-1.

22 **II. DISCUSSION**

23 **A. Jurisdiction**

24 Travelers’ notice of removal in this case alleges that this Court has diversity jurisdiction

1 under 28 U.S.C. § 1332(a). Dkt. No. 1 at 3. The parties are diverse: Travelers has its primary place
 2 of business in, and is organized under the laws of, Connecticut, and Sagdai is a resident of
 3 Washington. Dkt. No. 1-2 at 2.

4 To determine whether the jurisdictional amount has been established, courts may consider
 5 “facts presented in the removal petition as well as any summary-judgment-type evidence relevant
 6 to the amount in controversy at the time of removal.” *Matheson v. Progressive Specialty Ins. Co.*,
 7 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam) (cleaned up). A defendant who removes a case
 8 “may point to many different types of evidence” to establish the amount in controversy, and “[a]
 9 particularly powerful form of evidence is the plaintiff’s own statements about the damages they
 10 seek.” *Flores v. Safeway, Inc.*, No. C19-0825-JCC, 2019 WL 4849488, at *3 (W.D. Wash. Oct. 1,
 11 2019). Such statements can include settlement demands. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840
 12 (9th Cir. 2002) (per curiam); *see also Segar v. Allstate Fire & Cas. Ins. Co.*, No. C21-1526-JLR,
 13 2022 WL 102035, at *3 (W.D. Wash. Jan. 11, 2022) (“The court treats [plaintiff’s] pre-litigation
 14 demand as relevant evidence of the damages that he seeks—namely, the full \$100,000 UIM policy
 15 limit.”).

16 Although the complaint does not allege a specific amount of damages, Sagdai’s pre-suit
 17 demand letter does. The letter stated that his injuries “should be valued [at] no less than \$500,000”
 18 and he was “willing to settle the UIM part of his claim for his policy limits of \$250,000.00.” Dkt.
 19 No. 2-3 at 9. That demand “appears to reflect a reasonable estimate of the plaintiff’s claim,” *Cohn*,
 20 281 F.3d at 840, based on Sagdai’s claimed injuries. Dkt. No. 2-3 at 9 (alleging a “severe brain
 21 injury” that will affect him “for the foreseeable future”). Therefore, it is evident that more than
 22 \$75,000 is in controversy based on Sagdai’s demand and estimate of damages.

23 Because the parties are diverse and the amount in controversy requirement is met, this
 24 Court has jurisdiction over the claims under 28 U.S.C. § 1332(a). In addition, Travelers timely

1 removed this matter on February 12, 2021, within 30 days of when it was notified of Sagdai's
 2 lawsuit on February 5, 2021. Dkt. No. 1 at 4; *see* 28 U.S.C. § 1446(b)(1).

3 **B. Summary Judgment Standard**

4 Summary judgment is appropriate only when "the movant shows that there is no genuine
 5 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
 6 Civ. P. 56(a). The Court does not make credibility determinations or weigh the evidence at this
 7 stage. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The sole inquiry is "whether the
 8 evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-
 9 sided that one party must prevail as a matter of law." *Id.* at 251–52. And to the extent that the Court
 10 resolves factual issues in favor of the nonmoving party, this is true "only in the sense that, where
 11 the facts specifically averred by that party contradict facts specifically averred by the movant, the
 12 motion must be denied." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

13 The Court will, however, enter summary judgment "against a party who fails to make a
 14 showing sufficient to establish the existence of an element essential to that party's case, and on
 15 which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
 16 (1986). Once the moving party has carried its burden under Rule 56(c), "the nonmoving party must
 17 come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec.*
 18 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e))
 19 (emphasis omitted). Metaphysical doubt is insufficient, *id.* at 586, as are conclusory, non-specific
 20 allegations, *Lujan*, 497 U.S. at 888–89.

21 **C. The Scope of the Record**

22 Travelers requests that the Court strike as inadmissible the declaration of Ryan Nute, Dkt.
 23 No. 53, portions of the declaration of Rob Dietz, Dkt. No. 54, and "references to the assorted
 24 doctors referenced in Plaintiff's Response," Dkt. No. 55 at 1–3. When reviewing a motion for

summary judgment, the Court may “consider admissible evidence” *Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 998 (9th Cir. 2019), as well as evidence that “can ‘be presented in a form that would be admissible’ at trial,” *Harlow v. Chaffey Cnty. Coll. Dist.*, 2022 WL 4077103, at *1 (9th Cir. Sept. 6, 2022) (quoting Fed. R. Civ. P. 56(c)(2)) (emphasis in original). Therefore, the Court first addresses the evidentiary issues Travelers raises as well as the admissibility of Sagdai’s surreply and related filings, Dkt. Nos. 59, 60, 60-1, to determine the appropriate scope of the record for this motion.

1. The Declarations of Gavin Flynn, Ryan Nute, and Robert Dietz

Travelers moves to strike the declaration of attorney Ryan Nute, Dkt. No. 53, because it attempts “to introduce a hearsay expert opinion from an unnamed expert in a different case through the testimony of an attorney in that unrelated case.” Dkt. No. 55 at 1. It also moves to strike the declaration of Robert Dietz, who claims to be an “expert in claims handling and insurance bad faith,” Dkt. No. 54 at 1, because he opines about medical issues without the qualifications to do so, improperly asserts legal conclusions, and provides some opinions that are speculative and without foundation. Dkt. No. 55 at 1–3. But those declarations, and the declaration of Sagdai’s counsel Gavin Flynn, Dkt. No. 52, suffer from a more fundamental problem: none of them is certified as true under penalty of perjury as required by 28 U.S.C. § 1746.

To be admissible, the statute requires that the declaration be made “substantially” in the following language: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).” 28 U.S.C. § 1746(2); *see also Commodity Futures Trading Comm’n v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999). The purpose of this affirmation is to be certain that “the declarant understands the legal significance of the declarant’s statements and the potential for punishment if the declarant lies.” *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004).

1 None of the three declarations substantially complies with 28 U.S.C. § 1746 because none
 2 includes a certification under penalty of perjury. Nor do any of them contain a statement that the
 3 contents of the declaration are true. Therefore, the Court excludes and does not consider the
 4 declarations of Ryan Nute, Robert Dietz, and Gavin Flynn, Dkt. Nos. 52–54, including the portions
 5 of Sagdai’s response, Dkt. No. 51, that rely upon them.

6 2. Exhibits to Declarations

7 The Court must also consider the admissibility of the exhibits attached to the excluded
 8 declarations. Although Travelers moved to strike the contents of the declarations based on hearsay
 9 and other reasons as set forth above, it did not move to strike the exhibits or argue that they are
 10 inadmissible. Dkt. No. 55 at 1–3.

11 The declaration of Gavin Flynn attaches “a true and correct copy of selected materials from
 12 Defendant[’]s Claim File for Ivan Sagdai” and “a true and correct copy of selected pages from the
 13 Deposition of Robert Dietz[.]” Dkt. No. 52 at 1. The declaration of Ryan Nute attaches a “true and
 14 correct copy of Dr. Blue’s response addendum” from another case. Dkt. No. 53 at 2. Mr. Dietz
 15 attaches two documents to his declaration without attempting to authenticate either of them. Dkt.
 16 No. 54-1 (February 24, 2022 letter with attached report from Dr. Blue); Dkt. No. 54-2 (the Policy).
 17 However, these two documents are properly authenticated elsewhere in the record, Dkt. Nos. 43-
 18 1, 18-2, so the Court disregards the copies attached to Dietz’s declaration as duplicative.²

19 Without accompanying admissible declarations, the documents attached to them are not
 20 properly authenticated. However, “[c]ourts must now consider unauthenticated evidence at
 21 summary judgment if the evidence can ‘be presented in a *form* that would be admissible’ at trial.”
 22 *Harlow*, 2022 WL 4077103, at *1 (emphasis in original) (quoting Fed. R. Civ. P. 56(c)(2)).
 23

24 ² Parties may cite to documents already in the record rather than filing additional copies. See LCR 10(e)(6).

1 Although the documents are not properly authenticated now, they could be authenticated and
 2 presented in admissible form at trial. Therefore, the exhibits to the declarations of Mr. Flynn and
 3 Mr. Nute, Dkt. Nos. 52-1, 52-2, 53-1, are admissible for purposes of this motion, *see Harlow*, 2022
 4 WL 4077103, at *1, and the Court considers them.

5 3. Plaintiff's References to Doctors' Opinions

6 Travelers also “moves to strike references to the assorted doctors referenced in Plaintiff’s
 7 Response.” Dkt. No. 55 at 3 (citing Dkt. No. 51 at 8–10). Travelers avers that “[t]he statements
 8 attributable to Dr. Gorman, Dr. Kelly, Dr. Grinberg, and Dr. Zrazhevskaya are unsupported by any
 9 sworn declarations from these doctors” and therefore lack proper foundation and are hearsay. *Id.*
 10 Travelers notes that none of those doctors has submitted an expert report as required by Federal
 11 Rule of Civil Procedure 26. *Id.*

12 The doctors’ statements referenced in Sagdai’s response appear in the medical records in
 13 Travelers’ claim file. Dkt. No. 52-1. Dr. Yakov Grinberg saw Sagdai in October 2013 and noted
 14 that Sagdai “reports neck pain, foggy sensation in the head, fatigue, sleepiness, upper back pain.
 15 Symptoms started right after [the motor vehicle accident], but neck pain actually got worse in a
 16 few days. Patient reports no headache, blurred vision, weakness or numbness of extremities.” Dkt.
 17 No. 52-1 at 181. A November 2013 medical record from Dr. Gorman notes his “prior assessment”
 18 was “[s]hake type closed head injury on 10/20/2013 with some cognitive slowing, headache,
 19 retrieval type memory deficit and diminished smell sensation.” *Id.* at 226. Dr. Gorman also wrote,
 20 “MRI brain at Evergreen with tensor diffusion imaging shows some interruption of deep white
 21 matter tracts.” *Id.* The file also contains treatment notes from Dr. Yetena Zrazhavskaya, a
 22 Naturopathic Physician. *Id.* at 204. Her notes from a February 2014 visit list the symptoms Sagdai
 23 reported to her after the accident, including “diminished memory” and “nausea, headache, shooting
 24 pain to his head, thoracic and low back pain, brain fog, loss of concentration.” *Id.* She stated that

1 “[a]ll those symptoms started after [the motor vehicle accident] and they make it so difficult to run
 2 [his] construction business and be productive.” *Id.* She also noted that Sagdai reported dizziness
 3 and partial loss of the sense of smell. *Id.* at 205. By May 14, 2014, she noted “significant
 4 improvement” with his brain fog and memory loss, to the point that Sagdai was able to manage
 5 his business. *Id.* at 207. Dr. Kelly saw Sagdai in November 2016 and noted that Sagdai had suffered
 6 a “concussion with no loss of consciousness” from the accident. *Id.* at 61.

7 Those out-of-court statements are offered for the truth of the matter asserted, Dkt. No. 51
 8 at 8–9, and they appear to be hearsay. Fed. R. Evid. 801. But again, the Court must consider
 9 evidence presented for purposes of this motion if it can be can “be presented in a form that would
 10 be admissible’ at trial.” *Harlow*, 2022 WL 4077103, at *1 (emphasis in original) (quoting Fed. R.
 11 Civ. P. 56(c)(2)). The doctors’ statements are therefore admissible here because they could be
 12 presented in an admissible form at trial. *See id.*; accord *Fonseca v. Sysco Food Servs. of Ariz., Inc.*,
 13 374 F.3d 840, 846 (9th Cir. 2004) (concluding that “even the declarations that do contain hearsay
 14 are admissible for summary judgment purposes because they could be presented in an admissible
 15 form at trial.” (cleaned up)); *see also Denton v. Pastor*, No. 17-cv-5075, 2021 WL 6622137, at *3
 16 (W.D. Wash. Dec. 16, 2021) (declining to strike a physician’s diagnoses from a declaration
 17 because “one of plaintiff’s doctors could testify to plaintiff’s symptoms and diagnosis at trial”),
 18 *report and recommendation adopted*, 2022 WL 203489 (W.D. Wash Jan. 24, 2022); *Sadler v. State*
 19 *Farm Mut. Auto. Ins. Co.*, No. 07-cv-995Z, 2008 WL 4371661, at *6 (W.D. Wash. Sept. 22, 2008)
 20 (declining to strike a form signed by a doctor for purposes of evaluating a summary judgment
 21 motion).

22 Travelers also contends that the doctors’ opinions should be stricken because they did not
 23 provide expert reports, but treating physicians are not required to submit written reports under
 24 Federal Rule of Civil Procedure 26(a)(2)(B) as long as their opinions “were formed during the

1 course of treatment.” *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir.
 2 2011). “To the extent that the expert intends ‘to render expert testimony beyond the scope of the
 3 treatment rendered,’ however, the expert must provide a written expert report.” *Penny v. State*
 4 *Farm Mut. Auto. Ins. Co.*, No. 18-cv-5195-JLR, 2020 WL 5743037 (W.D. Wash. Sept. 25, 2020)
 5 (quoting *Goodman*, 644 F.3d at 826). Here, the doctors’ statements contained in Travelers’ claims
 6 file and set forth above appear to have been formed during the course of treatment, so the Court
 7 denies Travelers’ request to strike them.

8 4. Plaintiff’s Surreply

9 After the briefing was completed for this motion, Sagdai filed a surreply. Dkt. No. 59. A
 10 party may file a surreply that “requests to strike material contained in or attached to a reply brief[.]”
 11 LCR 7(g). A surreply “shall be strictly limited to addressing the request to strike. Extraneous
 12 argument or a surreply filed for any other reason will not be considered.” LCR 7(g)(2). Sagdai’s
 13 surreply is not limited to “requests to strike material” in Travelers’ reply brief and instead
 14 substantively responds to Travelers’ arguments that portions of Sagdai’s submissions should be
 15 stricken. *See generally* Dkt. No. 59; *see also* Dkt. No. 58 (providing notice of Sagdai’s “intent to
 16 file his Surreply seeking not to strike certain portions of his Response”). Because Local Civil Rule
 17 7(g) does not allow a surreply under those circumstances, the Court does not consider the surreply
 18 or the documents filed with it. Dkt. Nos. 59, 60, 60-1.

19 D. **Breach of Contract**

20 Under Washington law, “[a] breach of contract is actionable only if the contract imposes a
 21 duty, the duty is breached, and the breach proximately causes damage to the claimant.” *Nw. Independ.*
 22 *Forest. Mfrs. v. Dep’t of Labor & Indus.*, 899 P.2d 6, 9 (Wash. Ct. App. 1995). Sagdai alleges that
 23 Travelers breached its contractual duties under the Policy by failing to complete a reasonable
 24 investigation before making a compromise offer, making a compromise offer based on speculation

1 and inaccurate information, and failing to provide a reasonable explanation for its compromise
 2 offer. Dkt. No. 1-2 at 12–17. Travelers does not dispute that those allegations, if true, could
 3 constitute a breach of the Policy,³ but counters that Sagdai’s failure to cooperate relieves it of
 4 liability for any breach. Dkt. No. 41 at 16–20.

5 1. Failure to Cooperate: Policy Language and Legal Standard

6 Travelers contends that Sagdai’s breach of contract claim is barred because he refused to
 7 cooperate during its investigation. *Id.* The Policy required Sagdai to “[c]ooperate” with Travelers
 8 “in the investigation” of his claim, including “[s]ubmit[ting], as often as [Travelers] reasonably
 9 require[s] . . . to physical exams” and “[a]uthorizing [Travelers] to obtain” medical records. Dkt.
 10 No. 18-2 at 28. The Policy further provides that “[n]o legal action may be brought against
 11 [Travelers] until there has been full compliance with all the terms of this policy.” *Id.*

12 In Washington, “[w]hen an insured breaches an insurance policy’s cooperation clause, the
 13 insurer will be relieved of its duty to provide coverage if it can prove that the insured’s acts or
 14 omissions caused actual and substantial prejudice.” *Schwindt v. Commonwealth Ins. Co.*, 997 P.2d
 15 353, 358 (Wash. 2000); *see also Staples v. Allstate Ins. Co.*, 295 P.3d 201, 206–209 (Wash. 2013)
 16 (establishing that under Washington law, an insured that breaches a cooperation clause may be
 17 contractually barred from bringing suit under the policy). To prevail on the affirmative defense of
 18 noncooperation, an insurer must show three things: (1) the information at issue was material to the
 19 investigation or handling of the insured’s claim; (2) the insured failed to “substantially comply”
 20 with the terms of the cooperation clause; and (3) the insurer suffered actual prejudice as a result.
 21 *Staples*, 295 P.3d at 207, 209.

22
 23 ³ “Failure to adequately investigate, if proven, would constitute a breach of contract.” *Wall v. Country Mut. Ins. Co.*,
 24 319 F. Supp. 3d 1227, 1235 (W.D. Wash. 2018); *Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 938 (Wash.
 1998) (“When an insurer fails to adequately investigate an insured’s claim, the insured must either perform its own
 investigation to determine if coverage should have been provided or take no action at all. In either situation, the insured
 does not receive the full benefit due under its insurance contract.”).

1 2. Materiality

2 It is undisputed that Sagdai refused to provide requested records in derogation of his duty
 3 to do so under the Policy, and that he refused to submit to an IME. *See* Dkt. No. 51 at 14, 16. The
 4 parties' core dispute is whether the requested records and IME were material "to the investigation
 5 or handling of a claim," and if so, whether Travelers was prejudiced by Sagdai's refusal to provide
 6 them. *Staples*, 295 P.3d at 207; Dkt. No. 51 at 11–17. In addition, Sagdai argues that Travelers'
 7 requests for an IME were never reasonable, alluding to the Policy language requiring the insured
 8 to submit to physical exams "as often as [Travelers] *reasonably* requires." Dkt. No. 51 at 10–16
 9 (emphasis added).

10 "In general, information is material when it concerns a subject relevant and germane to the
 11 insurer's investigation as it was then proceeding at the time the inquiry was made." *Staples*, 295
 12 P.3d at 207 (cleaned up). "If the insurer claims that it was deprived of the ability to investigate, it
 13 must show that the kind of evidence that was lost would have been material to its defense." *Mut.*
 14 *of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866, 878 (Wash. 2008).

15 Travelers avers that its review of the available medical records revealed "no subjective
 16 evidence of any cognitive brain injury" and supported its \$10,000 valuation of the claim. Dkt. No.
 17 41 at 4–5. When Sagdai's counsel rejected the offer, Travelers stated that it was continuing to
 18 review the claim "as a matter of good faith," requested an additional IME "to further evaluate
 19 [Sagdai's] UIM claim," and requested Sagdai's consent to review the existing IME performed in
 20 relation to his PIP claim, noting that the PIP IME was unavailable for Travelers' review without
 21 such consent. Dkt. No. 19-1 at 2. Travelers asserts that it "cannot be logically rebutted" that
 22 "[o]btaining an IME and medical records from an insured who is making a claim for injuries
 23 constitutes a material request," and argues that Sagdai's refusal to satisfy these requests prevented
 24 Travelers from evaluating his claim and "review[ing] the entirety of [his] preexisting medical

records”—records that, once produced in accordance with the Court’s order, “directly contradicted [his] claims.” Dkt. No. 55 at 5–7; *see also* Dkt. No. 41 at 19; Dkt. No. 44 at 4 (because the adjustor assigned to the UIM claim “could not properly evaluate whether there was in fact any type of a brain injury” without “having the benefit of an IME in regard to Sagdai’s neurological conditions,” he “believe[d] it was appropriate . . . to seek further information as to this alleged claim”); Dkt. No. 46 at 4 (an IME was necessary in this case due to “the discrepancy between his claim as to the extent of his injuries and the medical documentation available”).

In response, Sagdai argues that, contrary to Travelers’ assertions, it already had access to the PIP file and reviewed it before asking Sagdai to provide it. Dkt. No. 51 at 8. With respect to the IME, Sagdai contends it was unreasonable for Travelers to request a physical examination after it “completed its investigation,” and an IME at that stage was therefore immaterial and not required under the Policy. Dkt. No. 51 at 10–16; *see also* Dkt. No. 18-2 at 28.

a. *Materiality and Reasonableness of IME Request*

Sagdai advances two theories in support of his argument that the IME was immaterial: (1) an IME conducted too long after an accident “is irrelevant to the question of the earlier injury” and (2) even “if a medical examination was material, then Travelers had a duty to [conduct it] before it completed its investigation[.]” Dkt. No. 51 at 11 (emphasis in original). The latter theory precludes a finding of reasonableness in this phase of the litigation.

Sagdai first emphasizes that “the Rule 35 [e]xaminer chosen by Travelers, Dr. James Blue, has sworn under oath that an examination one and a half years after an accident is irrelevant to the question of the earlier injury.” Dkt. No. 51 at 11. Dr. Blue explained that “it is the medical records alone that must give weight to the forensic opinions regarding injury and causation, not an examination one and a half years later.” *Id.* at 12; Dkt. No. 53-1 at 4. However, Dr. Blue did not state that a later IME is always irrelevant, and his statement was addressing another case that does

1 not appear to have involved an allegedly ongoing traumatic brain injury, *see* Dkt. No. 53-1 at 2–
 2 5. While Dr. Blue’s statement in this unrelated case could go to the weight of his testimony at trial,
 3 it does not demonstrate that an IME under the circumstances in this case was unreasonable or
 4 immaterial. *See, e.g., Allstate Indem. Co. v. Lindquist*, No. 20-cv-1508-JLR, 2022 WL 2357007,
 5 at *7 (W.D. Wash. June 30, 2022) (explaining that defendant’s “argument about the persuasiveness
 6 of [an expert’s] testimony . . . is properly addressed to and resolved by the jury.”). Indeed, here the
 7 parties dispute whether there was an ongoing brain injury at all, *compare* Dkt. No. 2-3 at 5 *and*
 8 Dkt. No. 44-2 at 2 *with* Dkt. No. 41 at 4–5 *and* Dkt. Nos. 44-1, 19-8, and even assuming an IME
 9 could not determine causation, it could determine whether Sagdai suffered from an ongoing brain
 10 injury. *See* Dkt. No. 18-1 at 18 (“Travelers is requesting an IME by a neurologist in order to . . .
 11 investigate [Sagdai’s] current medical conditions”); Dkt. No. 41 at 8 (same); *Vario v. First Nat'l
 12 Ins. Co.*, No. C16-1900-RSM, 2017 WL 3172825, at *3 (W.D. Wash. July 26, 2017) (“[Plaintiff]
 13 claims his injuries, and the damages stemming from those injuries, are ongoing, thus making a
 14 medical examination relevant.”). And this Court previously held that an IME was relevant in this
 15 case. Dkt. No. 28 at 4.

16 Sagdai relies on his claims handling expert, Robert Dietz, in advancing the alternative
 17 theory that an insurer is not entitled to request an IME after it completes its investigation of an
 18 insured’s claim. Dkt. No. 51 at 13–16. Dietz testified in his deposition that his “criticism with
 19 respect to the examination rests solely with the timing of [Travelers’] request.” *Id.* at 14; Dkt. No.
 20 52-2 at 6; *see also id.* at 3 (“Well, if they think they need a physical examination, that should occur
 21 as part of their obligation to complete a reasonable investigation. And that’s opposed to in this
 22 case, where they . . . supposedly [had] an internal review . . . and an evaluation based on that.”).
 23 Dietz elaborated that it was incumbent on Travelers to first respond to Sagdai’s request for
 24 information about the basis for its valuation of his claim “and then I think it was reasonable to

1 expect Sagdai to allow access to the PIP file and for scheduling a physical exam.” Dkt. No. 52-2
 2 at 9.

3 Dietz’s opinions and Sagdai’s arguments are self-contradictory. Dietz simultaneously
 4 opines that a post-offer request is unreasonable but that it “was reasonable to expect Sagdai” to
 5 comply after Travelers provided more information about its compromise offer. *Id.* at 5, 9. And
 6 Sagdai emphasizes the Washington State Supreme Court’s warning in *Staples* “that there must be
 7 some limit” to an insurer’s ability to demand examinations while also insisting that Travelers’ sole
 8 opportunity to conduct an exam was before it completed its investigation. Dkt. No. 51 at 13.
 9 Sagdai’s one-bite-at-the-apple approach would present insurers with a Hobson’s choice⁴: demand
 10 an IME from every claimant who might contest the claim valuation, thereby risking a bad faith
 11 claim, or forego it and relinquish the right to request one even if it becomes relevant post-offer.
 12 See *Staples*, 295 P.3d at 206 (“it would surely violate an insurer’s good faith duty to demand an
 13 [examination under oath] from every single claimant simply to burden insureds and set up pretexts
 14 for denying claims.”).

15 Although the Court finds that an IME was material to this case and rejects Sagdai’s blanket
 16 proposition that an “after the fact” request for an IME is per se unreasonable, the question remains
 17 whether the *timing* of Travelers’ IME request was unreasonable based on the specific facts of this
 18 case. Sagdai argues that an adequate review of the records provided to Travelers would have
 19 revealed that the severe impact of the motor vehicle accident caused Sagdai continuing cognitive
 20 deficits. Dkt. No. 51 at 5–10. Therefore, at least according to Sagdai, Travelers should have
 21 requested an IME as part of its initial investigation, rather than waiting until after the offer. *Id.* at
 22

23 ⁴ “[A]n apparent freedom to take or reject something offered when in actual fact no such freedom exists: an apparent
 24 freedom of choice where there is no real alternative.” *Tran v. State Farm Fire & Cas. Co.*, 961 P.2d 358, 366 (Wash.
 1998) (quoting Webster’s Third New International Dictionary 1076 (3d ed. 1986)).

1 11, 13–14. These arguments, coupled with the apparent shortcomings of Travelers’ initial
 2 investigation (discussed in detail below), are sufficient to preclude summary judgment. The Court
 3 cannot say that no reasonable trier of fact could find that Travelers’ request was unreasonable. And
 4 Sagdai was not required to comply with unreasonable requests for an IME. Dkt. No. 18-2 at 28.
 5 Finally, although Travelers is correct that the Court has already held that an IME was relevant in
 6 its order granting Travelers’ motion to compel, Dkt. No. 55 at 6 (citing Dkt. No. 28 at 4–5), that
 7 order did not address whether the *timing* of the request for an IME was reasonable for purposes of
 8 Travelers’ lack of cooperation defense. Therefore, there is an issue of fact about the reasonableness
 9 of Travelers’ post-compromise offer request for an IME.

10 b. *Materiality of PIP records*

11 The Policy requires Sagdai to “[a]uthorize [Travelers] to obtain: (a) medical reports; and
 12 (b) other pertinent records.” Dkt. No. 18-2 at 28. Travelers avers that it requested access to the
 13 medical records in the PIP file, including an earlier IME located therein, Dkt. No. 19-1 at 2,
 14 because its practice is to assign different adjusters to an insured’s PIP and UIM claims, and “the
 15 information between the two claims files is typically not shared” without the insured’s permission.
 16 Dkt. No. 44 at 2. Mr. Dietz agrees that it is reasonable and a common industry practice to “split”
 17 the claims file this way. Dkt. No. 52-2 at 4-5; *see also* Dkt. No. 46 at 2.

18 It is undisputed that Sagdai refused to authorize Travelers to access the PIP file, but it is
 19 not clear that the file was material to Travelers’ investigation. As Sagdai notes, William
 20 Shoemaker, a Claim Professional at Travelers, reviewed the material in the PIP file, and David
 21 Orme conducted a “management review.” Dkt. No. 51 at 4, 17 (citing Dkt. No. 52-1 at 238
 22 (November 5, 2018 note in Traveler’s UIM file on Sagdai stating that “[i]n the meantime we can
 23 review what records we have in the PIP claim and form a general opinion of the injuries and set a
 24 logical reserve.”); *id.* at 239 (“Reviewed medical records from PIP”; “no demand in yet – we have

1 only looked at the PIP records"); *id.* at 182–90 (Dr. Lecovin's IME)).⁵ Mr. Shoemaker had a
 2 significant role with the UIM claim, reviewing the records and communicating with Sagdai's
 3 counsel in writing and by phone about Travelers' compromise offer. Dkt. No. 52-1 at 238; Dkt.
 4 No. 44-1 at 2. Therefore, there is an issue of fact about whether Travelers' employees evaluating
 5 the UIM claim accessed the PIP documents; if they did, then Sagdai's after-the-fact authorization
 6 may have been immaterial to Travelers' investigation.⁶

7 3. Substantial Compliance

8 Although Travelers' request for authorization to access the PIP file may not have been
 9 material to its investigation, it is undisputed that Sagdai refused to participate in an IME. However,
 10 there is a genuine dispute of material fact as to whether Travelers' request for an IME was
 11 reasonable. Because Sagdai would not have been required to submit to an IME if the request was
 12 unreasonable, the Court cannot conclude at this juncture that he failed to substantially comply with
 13 the terms of the cooperation clause.

14 4. Prejudice

15 The Court need not reach the issue of prejudice because a genuine dispute of material fact
 16 prevents Travelers from establishing the first two elements of its noncooperation defense. Because
 17 those elements have not been established, the Court denies Travelers' motion for summary
 18 judgment on Sagdai's breach of contract claim.

19
 20 **E. Bad Faith Claim**

21
 22 ⁵ This Court's Standing Order for All Civil Cases prohibits citations in footnotes. Standing Order at 4,
<https://www.wawd.uscourts.gov/sites/wawd/files/KingStandingOrderReCivilCases.pdf>. Sagdai's Response is replete
 23 with such citations. Dkt. No. 51. In the future, briefs that do not comply with the Standing Order will be stricken.

24 ⁶ In its reply, Travelers asserts that the claims handler for the UIM file did not access the PIP file "due to [Sagdai's]
 25 counsel's revocation of access to those materials." Dkt. No. 55 at 8. But materiality is still an unanswered question,
 26 as Travelers' UIM file on Sagdai contains pertinent notes from the PIP file. *See* Dkt. No. 52-1 at 239.

1 Sagdai argues that Travelers engaged in bad faith by (1) engaging a nurse reviewer to
 2 evaluate the claim who misrepresented facts and applied an incorrect presumption about his
 3 preexisting conditions; (2) mispresenting pertinent facts to that reviewer; (3) falsely claiming that
 4 it did not access the documents in his PIP file, (4) failing to provide a reasonable explanation for
 5 its compromise offer, and (5) engaging in bad faith during this litigation. Dkt. No. 51 at 3–16.
 6 Travelers counters that it conducted a reasonable investigation and paid Sagdai the full value of
 7 his claim, and that in any event Sagdai has not shown that he incurred any damages as a result of
 8 its alleged bad faith. Dkt. No. 41 at 1–2, 22–23. For the reasons set forth below, genuine disputes
 9 of material fact preclude summary judgment on all but two of the bases for Sagdai’s bad faith
 10 claim.

11 1. Legal Standard

12 “Claims of insurer bad faith are analyzed applying the same principles as any other tort:
 13 duty, breach of that duty, and damages proximately caused by any breach of duty.” *St. Paul Fire*
 14 & *Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664, 668 (Wash. 2008) (cleaned up). An insurer has a
 15 duty of good faith to its policyholder, and it typically owes a heightened duty to “give equal
 16 consideration to the insured’s interests and its own interests.” *Liberty Int’l Underwriters v. Carlson*, No. 04-cv-348-JLR, 2006 WL 623785, at *9 (W.D. Wash. Mar. 13, 2006) (citing *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 78 P.3d 1266, 1270 (Wash. 2003)). However, this
 17 enhanced duty does not exist with a UIM claim because the insurer stands in the shoes of the
 18 tortfeasor, can assert any defense to liability that the tortfeasor has, and is therefore in an
 19 adversarial relationship with its own insured. See *Garrison v. Allstate Ins. Co.*, No. 21-cv-00624-
 20 DGE, 2022 WL 1061916, at *4 (W.D. Wash. Apr. 8, 2022). Nevertheless, the insurer still owes
 21 the insured a duty of good faith and fair dealing. *Id.*

24 Washington courts have repeatedly emphasized that the test for bad faith “is not whether

1 the insurer's interpretation [of the policy] is correct, but whether the insurer's conduct was
 2 reasonable." *Wright v. Safeco Ins. Co.*, 109 P.3d 1, 10 (Wash. Ct. App. 2004); *see also Anderson*
 3 *v. State Farm Mut. Ins. Co.*, 2 P.3d 1029, 1033 (Wash. Ct. App. 2000) ("The determinative
 4 question is reasonableness of the insurer's actions in light of all the facts and circumstances of the
 5 case."). Thus, "to succeed on a bad faith claim, the policyholder must show the insurer's breach of
 6 the insurance contract was unreasonable, frivolous, or unfounded." *Smith v. Safeco Ins. Co.*, 78
 7 P.3d 1274, 1277 (Wash. 2003) (en banc). Whether the insurer acted reasonably is often a question
 8 of fact. *Id.*; *Hell Yeah Cycles v. Ohio Sec. Ins. Co.*, 16 F. Supp. 3d 1224, 1235 (E.D. Wash. 2014)
 9 ("Bad faith claims generally raise fact issues preventing a determination on summary judgment.").
 10 Accordingly, a bad faith claim "can be resolved on summary judgment only if there are no disputed
 11 material facts pertaining to the reasonableness of the insurer's conduct under the circumstances,
 12 or the insurance company is entitled to prevail as a matter of law on the facts construed most
 13 favorably to the nonmoving party." *Lindquist*, 2022 WL 2357007, at *5 (cleaned up). But this is
 14 not a free pass to trial, as the insured "has the burden of proof" and "must come forward with
 15 evidence that the insurer acted unreasonably." *Smith*, 78 P.3d at 1277.

16 2. Failure to Cooperate

17 Travelers asserts that Sagdai's bad faith claim should be dismissed based on his failure to
 18 cooperate with Travelers' investigation. Dkt. No. 41 at 22; Dkt. No. 55 at 8–9. This argument is
 19 unavailing. Among other things, Sagdai accuses Travelers of bad faith in its initial investigation
 20 and compromise offer, Dkt. No. 1-2 at 12–15; Dkt. No. 51 at 3–10—actions that occurred before
 21 Sagdai refused to provide access to the PIP file or undergo an IME. Dkt. No. 44-1 at 2 (April 19,
 22 2019 compromise offer); Dkt. No. 19-1 at 2 (August 22, 2019 letter requesting access to the PIP
 23 file and for an IME). For that reason, Travelers cannot show that it was prejudiced in its initial
 24 investigation or in making the compromise offer.

1 3. Access to the PIP File

2 In his opposition to Travelers' motion, Sagdai contends that Travelers engaged in bad faith
 3 by repeatedly requesting access to the documents in his PIP file even though it had already
 4 reviewed the documents therein. Dkt. No. 51 at 3–4. But Sagdai does not include this basis for his
 5 bad faith claim in his complaint, *see* Dkt. No. 1-2, and it cannot be asserted at this stage of the
 6 litigation without running afoul of Federal Rule of Civil Procedure 8. *See Pickern v. Pier 1 (U.S.)*
 7 Inc., 457 F.3d 963, 968–69 (9th Cir. 2006) (Rule 8's liberal notice pleading standard "requires that
 8 the allegations in the complaint give defendant fair notice of what the plaintiff's claim is and the
 9 grounds upon which it rests.") (cleaned up). Therefore, Travelers is entitled to summary judgment
 10 on Sagdai's assertion that it engaged in bad faith by requesting access to the PIP file.

11 4. Bad Faith Investigation

12 An insured may maintain an action for bad faith investigation regardless of whether the
 13 insurer's coverage decision was correct. *Coventry*, 961 P.2d at 937.

14 Sagdai alleges that Travelers conducted a bad faith investigation of his claim because it did
 15 not adequately review or examine his medical records, did not draw reasonable conclusions from
 16 those records, and did not provide a reasonable explanation for its compromise offer. Dkt. No. 1-
 17 2 at 12–16; Dkt. No. 51 at 2–3, 5–10, 14–16 (asserting that Travelers gave its nurse reviewer
 18 incomplete records; that the nurse then misrepresented the facts from the records she did have; and
 19 that Travelers gave the Rule 35 examiner incomplete medical records and misleading property
 20 value documents). He specifically contends that Travelers claims personnel internally noted
 21 "[h]eavy damage" from a "severe rear end impact" to Sagdai's vehicle but informed the nurse
 22 reviewer that the vehicle had sustained only "moderate" damage. Dkt. No. 51 at 5. The nurse
 23 reviewer noted that "[t]here was rear end and front end damage" to the vehicle without noting its
 24 extent. Dkt. No. 52-1 at 242.

1 Travelers counters that the nurse “made her own conclusions based on the information that
 2 was provided,” Dkt. No. 55 at 8, but that statement is not supported by any citation to the record.
 3 Nor has the nurse reviewer submitted a declaration. Moreover, the record shows that the nurse
 4 reviewer’s evaluation was inaccurate. She wrote that there was no evidence “of a concussion
 5 diagnosis (wider ranging injury to the brain).” Dkt. No. 52-1 at 243; *id.* at 244 (“at no point was a
 6 concussion diagnosis made.”). But before her review, Dr. Gorman diagnosed Sagdai with a
 7 “[s]hake type closed head injury on 10/20/2013 with some cognitive slowing, headache, retrieval
 8 type memory deficit and diminished smell sensation.” Dkt. No. 52-1 at 226. Dr. Kelly saw Sagdai
 9 in November 2016 and noted that Sagdai had suffered a “concussion with no loss of
 10 consciousness” from the accident. *Id.* at 61. He also wrote that his diagnostic impression “indicates
 11 manifestations of traumatic brain injury[.]” *Id.* at 62.

12 The nurse reviewer also indicated that Sagdai’s injuries did not affect his ability to work:
 13 “All the while claimant continued working as a general contractor.” *Id.* at 243. But Dr. Gorman
 14 stated that Sagdai was “unable to work” for three weeks shortly after the accident. *Id.* at 226. In
 15 February 2014, Dr. Yetena Zrazhavskaya listed the symptoms Sagdai reported to her after the
 16 accident, including “diminished memory” and “nausea, headache, shooting pain to his head,
 17 thoracic and low back pain, brain fog, loss of concentration.” *Id.* at 204. She observed that “[a]ll of
 18 those symptoms started after [the motor vehicle accident] and they make it so difficult to run [his]
 19 construction business and be productive.” *Id.* (noting that Sagdai would tire at work so easily that
 20 “he is not working on [the] construction site by himself.”). While Travelers alleges that it lacked
 21 medical records from Sagdai’s PIP file, Dkt. No. 44 at 2–4, it does not allege that it lacked medical
 22 records from Drs. Gorman, Kelly, and Zrazhavskaya. *See also* Dkt. No. 52-1 at 239 (pertinent
 23 notes from PIP records in Travelers’ UIM file for Sagdai); *id.* at 238, 239 (notes in the same portion
 24 of the file to “review for relatedness of the concussion to ongoing complaints of a TBI”). There

1 are issues of fact regarding whether the nurse reviewer relied on inaccurate or incomplete
 2 information and inaccurately summarized the medical information for the claims adjuster. *See*
 3 *Dees v. Allstate*, 933 F. Supp. 2d 1299, 1308 (W.D. Wash. 2013) (denying summary judgment on
 4 bad faith claim where it was unclear whether the insurer “properly considered all medical evidence
 5 in the case.”).

6 There is also an issue of fact regarding whether Travelers’ explanation for its coverage
 7 decision was reasonable. Insurers in Washington are required to provide a reasonable explanation
 8 for a compromise offer, Wash. Admin. Code § 284-30-330(13), and a violation of the insurance
 9 code regulations constitutes a breach of the insurer’s duty of good faith. *See, e.g., Rizzuti v. Basin*
 10 *Travel Serv. of Othello, Inc.*, 105 P.3d 1012, 1019 (Wash. Ct. App. 2005). Travelers’ explanation
 11 of its compromise offer contained at least two inaccuracies. It stated that Sagdai “did not miss any
 12 time” from work and was diagnosed with a “contusion type head injury.” Dkt. No. 44-1 at 2. But
 13 as set forth above, Sagdai missed three weeks of work in accordance with his doctor’s
 14 recommendation, Dkt. No. 52-1 at 226, and was diagnosed with a concussion, *id.* at 61. In addition,
 15 Mr. Dietz opines that based on his experience, the explanation was insufficient. Dkt. No. 52-2 at
 16 14 (“[I]n my 32 years, it doesn’t meet a reasonable explanation.”). Finally, Travelers’ conclusory
 17 and inaccurate explanation is of the type that courts have found to violate the insurance code. *See,*
 18 *e.g., Travelers Cas. & Sur. Co. v. Spectrum Glass Co., Inc.*, No. 11-cv-1324-JCC, 2012 WL
 19 3780356, at *5 (W.D. Wash. Aug. 31, 2012) (insurer’s letter was insufficient where it “merely
 20 listed the . . . claims and relief sought, identified various policy provisions and two exclusions, and
 21 concluded summarily that the entire . . . action was not covered beyond \$100,000 in defense
 22 expenses.”); *Hell Yeah Cycles*, 16 F. Supp. 3d at 1234 (finding violation where insurer “provided
 23 little or inaccurate explanation” for the basis of its denial).

24 5. Alleged Bad Faith After Filing of UIM Lawsuit

1 Sagdai asserts that Travelers engaged in bad faith during this litigation, including by
 2 “rely[ing] on the memory of a documented brain injured person instead of the medical records
 3 from the time of the collision.” Dkt. No. 51 at 18; *see also* Dkt. No. 1-2 at 14–15. He appears to
 4 be referring to the deposition Travelers conducted in this case, but he cites no authority to support
 5 this theory. Nor has he cited any way that Travelers has used his deposition testimony other than
 6 to cite it to the Court in its motion for summary judgment. And there is no evidence that he has
 7 experienced damages as a result of those citations. The Court has already held that Travelers was
 8 entitled to depose Sagdai in this litigation, Dkt. No. 28 at 1, and doing so was not bad faith.

9 Moreover, Sagdai did not include this basis for his bad faith claim in his complaint, Dkt.
 10 No. 1-2, and he has not cited anything in the record to support his allegations of litigation-based
 11 bad faith. Dkt. No. 51 at 18. Therefore, Travelers is entitled to summary judgment on Sagdai’s
 12 assertion that it has engaged in bad faith during this litigation.

13 6. Damages

14 Travelers also argues that Sagdai cannot show that he has incurred damages as a result of
 15 Travelers’ alleged bad faith, and that the litigation-based damages he cites are insufficient. Dkt.
 16 No. 55 at 11. “In a first-party [insurance] context, there is no rebuttable presumption of harm.”
 17 *Coleman v. Am. Com. Ins. Co.*, No. 09-5721RJB, 2010 WL 3720203, at *3 (W.D. Wash. Sept. 17,
 18 2010) (citing *Coventry*, 961 P.2d at 938). “The insured must prove actual harm, and its damages
 19 are limited to the amounts it incurred as a result of the bad faith, as well as general tort damages.”
 20 *Id.* The insured is ““liable for the consequential damages to the insured as a result of the insurer’s
 21 breach of its contractual and statutory obligations.”” *Id.* (quoting *Coventry*, 961 P.2d at 939).

22 Sagdai does not just allege litigation-based damages; he alleges damages from the collision
 23 that exceed the \$10,000 paid by Travelers and the loss of the use of that money. Dkt. No. 51 at 19;
 24 *see also* Dkt. 1-2 at 16. That allegation is sufficient at this point to create an issue of fact regarding

1 whether he suffered actual damages as a result of Travelers' alleged bad faith. *See, e.g., Fireman's
 2 Fund Ins. Cos. v. Alaskan Pride P'ship*, 106 F.3d 1465, 1470 (9th Cir. 1997) (damages for a bad
 3 faith claim can "include loss of use of funds the [insured] would have received if the [i]nsurer
 4 honored the claim"); *see also Dees*, 933 F. Supp. 2d at 1308 ("If [the plaintiff] can establish that
 5 she incurred damages as result of the automobile accident and those damages are covered by her
 6 UIM policy but remain unpaid in bad faith, then [she] is entitled to recover those damages.").

7 Accordingly, Travelers is not entitled to summary judgment on Sagdai's bad faith claim
 8 except with respect to his theories based on Travelers' request for PIP files and litigation conduct.

9 **F. CPA Claim**

10 To establish a CPA claim, a plaintiff must prove that (1) the defendant engaged in an unfair
 11 or deceptive act or practice (2) occurring in trade or commerce and (3) impacting the public interest
 12 that (4) injured the plaintiff's business or property and (5) was caused by the defendant. *Hangman
 13 Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). A violation of an
 14 insurance regulation satisfies the first three elements of a CPA claim. *Naxos, LLC v. Am. Fam. Ins.
 15 Co.*, No. 18-cv-1287-JLR, 2020 WL 777260, at *22 (W.D. Wash. Feb. 18, 2020); *see also
 16 Cochrane v. Am. Guar. & Liab. Ins. Co.*, 471 F. Supp. 3d 1140, 1154 (W.D. Wash. 2020) ("[A]n
 17 insurer's 'bad faith constitutes a per se violation of the CPA.'" (quoting *Ledcor Indus. (USA), Inc.
 18 v. Mut. of Enumclaw Ins. Co.*, 206 P.3d 1255, 1262 (Wash. 2009))).

19 Sagdai contends that Travelers "engaged in unfair or deceptive acts or practices when
 20 investigating and processing [his] UIM claim." Dkt. No. 1-2 at 17. Travelers argues that it is
 21 entitled to summary judgment on that claim because Sagdai cannot demonstrate that it engaged in
 22 an unfair or deceptive act and cannot establish an actual injury to his business or property. Dkt.
 23 No. 41 at 24. Sagdai did not respond to this portion of Travelers' motion, but the Court cannot
 24 assume that the claim lacks merit based on a failure to respond on summary judgment. LCR

1 7(b)(2).

2 As set forth above, a jury must decide whether Travelers' investigation and explanation for
 3 its compromise offer were in bad faith and/or whether they violated Washington Administrative
 4 Code § 284-30-330(13). If the jury's verdict is adverse to Travelers on these issues, then the first
 5 three elements of Sagdai's CPA claim would be established. *Naxos, LLC*, 2020 WL 777260, at
 6 *22. And as to the fourth element, the "deprivation of contracted-for insurance benefits is an injury
 7 to business or property" under the CPA. *Peoples v. United Servs. Auto. Ass'n*, 452 P.3d 1218, 1222
 8 (Wash. 2019). Recoverable damages under the CPA "can include policy benefits that were
 9 unreasonably denied, subject to the policy's limits and other applicable terms and conditions." *W.*
 10 *Beach Condo. v. Commonwealth Ins. Co. of Am.*, 455 P.3d 1193, 1200 (Wash. Ct. App. 2020)
 11 (holding that the trial court erred in not allowing the jury to decide whether the insurer violated
 12 the CPA "by failing to pay for . . . covered damage."). And because Sagdai alleges that Travelers
 13 underpaid the claim based on its faulty investigation and conclusions, the allegedly underpaid
 14 damages would be "causally linked" to those "unfair or deceptive act[s]." *Schreib v. Am. Family*
 15 *Mut. Ins. Co.*, 129 F. Supp. 3d 1129, 1137 (W.D. Wash. 2015) (cleaned up). Sagdai also alleges
 16 another source of injury under the CPA: he incurred damages hiring an expert "both for claims
 17 handling and for the investigation of his injuries." Dkt. No. 51 at 19. "An insured is injured for
 18 purposes of the CPA if, 'as a result of [an insurer's] bad faith investigation,' the insured 'hired
 19 insurance experts to determine if coverage was denied in bad faith.'" *Hopkins v. Integon Gen. Ins.*
 20 *Co.*, No. 21-35196, 2022 WL 851750, at *1 (9th Cir. Mar. 22, 2022) (quoting *Coventry*, 961 P.2d
 21 at 939).

22 Accordingly, it is for a jury—not the Court—to decide Sagdai's CPA claim.

23 **III. CONCLUSION**

24 For the foregoing reasons, the Court GRANTS in part and DENIES in part Travelers'

1 motion for summary judgment. Dkt. No. 41. The Court GRANTS the motion as to Sagdai's claim
2 for bad faith based on Travelers' litigation conduct and request for access to the PIP file.
3 Otherwise, the motion is DENIED.

4 Dated this 3rd day of November, 2022.

5 
6 Lauren King
7 United States District Judge